

Public Employees' Right to Privacy in Their Electronic Communications: *City of Ontario v. Quon* in the Supreme Court

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Summary

In *City of Ontario v. Quon*, the Supreme Court held that officials had acted reasonably when they reviewed transcripts of messages sent to and from Sergeant Quon's city-issued pager in order to determine whether service limits on the pager's use should be increased. The Court assumed, without deciding, that Quon had a reasonable expectation of privacy for Fourth Amendment purposes, but found that the search of the transcripts was reasonable.

In *O'Connor v. Ortega*, the Court had earlier split over the question of what test should be used to assess the reasonableness of a search of a public employee's work space. A plurality favored one test (work-related purpose for a search not excessively intrusive in scope); Justice Scalia another (search that would be considered reasonable in a private-employer context). In *Quon*, the Court declined to resolve the issue, but concluded that the search at issue was reasonable under either test.

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Introduction

The United States Supreme Court in *City of Ontario v. Quon* overturned a federal appellate court decision which had held that officials in the City of Ontario, California engaged in an unconstitutional search and seizure when they acquired and read the contents of messages sent to and from a city police officer's city-provided pager.¹ "Though the case touches issues of far-reaching significance, the Court conclude[d] it can be resolved by settled principles determining when a search is reasonable."

Background

The City of Ontario assigned Sergeant Jeff Quon and several other SWAT team members two-way text messaging pagers in 2001.² The City's contract with the service provider, Arch Wireless Operating Co., Inc., set a limit of 25,000 characters for each pager. Arch Wireless assessed addition charges for use beyond the 25,000 character limit.³ Although it had no written policy on use of the pagers as such, the City did have a written policy concerning computer, Internet and e-mail practices. Under the policy the use of City equipment was limited to official business; it also informed employees that use would be monitored and that "users should have no expectation of privacy or confidentiality when using these resources."⁴ Officers were told that the e-mail policy applied to use of the pagers.⁵ When the City began to incur charges because the 25,000 character limit on pager use had been exceeded, its initial reaction was to assume the excess was attributable to personal use. Rather than try and sort out official from unofficial use, the lieutenant with administrative responsibility over pager use told individual officers that they would have to pay for the excess charges assessed against their pagers.⁶ On several occasions, Sergeant Quon was told he had exceeded his monthly limit, and he paid the charges for the excess use.⁷

Thereafter, the Chief of Police became concerned and asked Arch Wireless to supply the City with transcripts of the messages sent from, and received by, pagers that had exceeded the monthly 25,000 character limit.⁸ After examining the contents of the messages sent to and from Sergeant Quon's pager, the City determined that some were highly personal messages between Sergeant Quon and either his wife (who was also a police officer) or his girl friend (who was a police dispatcher).⁹

Sergeant Quon, Jerilyn Quon (his wife), April Florio (his girl friend), and Steve Trujillo (his fellow SWAT team officer) sued Arch Wireless, the City, and the Chief of Policy, alleging, among other things, violations of the federal Stored Communications Act (SCA) and of the Fourth Amendment.

¹ *City of Ontario v. Quon*, 130 S.Ct. 2619 (2010), rev'g, *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d 892 (9th Cir. 2008), cert. granted sub nom., *City of Ontario v. Quon* (Doc. No. 08-1332), 130 S.Ct. 1011 (2009).

² *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d at 895.

³ *Id.* at 896.

⁴ *Id.* at 896-87.

⁵ *Id.* at 896.

⁶ *Id.* at 897.

⁷ *Id.*

⁸ *Id.* at 898.

⁹ *Id.*

Under the Fourth Amendment, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁰

The district court’s analysis of Quon’s Fourth Amendment challenge began with the Supreme Court’s decision in *O’Connor v. Ortega*.¹¹ There, the Justices of the Supreme Court had all agreed that Dr. Ortega, a physician in a public hospital, had a reasonable expectation of privacy of his office, and that the Fourth Amendment applied notwithstanding his government employment.¹² There the consensus ended. A majority of the Court felt the lower court had used the wrong standard to assess whether hospital officials had unreasonably searched Dr. Ortega’s office, but they did not agree among themselves on what that the standard should be.

Articulating the standard subsequently followed in the lower federal courts and joined by three other members of the Court, Justice O’Connor observed that in “the case of searches conducted by a public employer,” the test must begin with a “balanc[ing of] the invasion of the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.”¹³ In that context, the otherwise applicable warrant requirement might be dispensed with, since “requiring an employer to obtain a warrant whenever the employer wished to enter an employee’s office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome.”¹⁴ As for the ordinarily applicable probable cause requirement, the ‘special needs, beyond the normal need for law enforcement make the . . . probable cause requirement impracticable’. . . [P]ublic intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standards of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.”¹⁵

The four dissenting Justices agreed Dr. Ortega had a reasonable expectation of privacy in his office, desk, and files, but they saw no “special need” sufficient to dispense with the ordinary warrant and probable cause requirements.¹⁶

The ninth Justice, Justice Scalia, felt that government employment gave rise to a special needs analysis.¹⁷ He disagreed with the standard announced in the Justice O’Connor’s plurality opinion, but agreed that the case should be returned to the lower courts for a special needs assessment of Fourth Amendment reasonableness.¹⁸

¹⁰ U.S. Const. Amend. IV.

¹¹ 480 U.S. 709 (1987).

¹² *Id.* at 717 (opinion of O’Connor, J., with Rehnquist, Ch.J., and White and Powell, JJ.); *id.* at 729 (Scalia, J., concurring in the judgment); *id.* at 732 (Blackmun, J., with Brennan, Marshall, and Stevens, JJ., dissenting).

¹³ *Id.* at 719-20.

¹⁴ *Id.* at 722.

¹⁵ *Id.* at 725-26, quoting *New Jersey v. T.L.L.*, 469 U.S. 325, 351 (Blackmun, J., concurring in the judgment).

¹⁶ *Id.* at 732 (Blackmun, J., with Brennan, Marshall, and Stevens, JJ., dissenting).

¹⁷ *Id.* at 732 (Scalia, J., concurring in the judgment).

¹⁸ *Id.* (“[S]pecial needs’ are present in the context of government employment. . . . I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules – searches of the sort that are regarded as reasonable and normal in the private-employer context – do not violate the Fourth Amendment. Because the conflicting and incomplete evidence in the present case could not conceivably support summary judgment that the

Subsequent lower federal appellate courts adopted the standard of the *O'Connor* plurality in public employee cases, *see e.g.*,

The Supreme Court has held that the Fourth Amendment applies to “searches and seizures by government employers or supervisors of the private property of their employees.” *O'Connor v. Ortega*, 480 U.S. 709 (1987). With respect to the scope of Fourth Amendment rights in the workplace, however, the Court added that “[t]he operational realities of the workplace ... may make *some* employees' expectations of privacy unreasonable.” *Id.* at 717. Practices and procedures of a particular office or legitimate regulations may reduce the expectation of privacy that government employees enjoy in their workplace. *Id.* The circumstances of a particular case matter a great deal, and each Fourth Amendment claim in this context has to be examined on its own. “Given the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.” *Id.* at 718.

Once an employee demonstrates a reasonable expectation of privacy, he must then demonstrate that the search was unreasonable. “[P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances.” This standard has two requirements: First, the search must have been “justified at its inception,” and second, it must have been “reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 726.¹⁹

In a number of special needs cases decided after *O'Connor*, however, the Supreme Court made it clear that a search need not be the least intrusive possible in order to be considered reasonable in scope.²⁰

Quon in the Lower Courts

The police officers sued alleging violations of the Stored Communications Act as well as violations of the Fourth Amendment. The district court found no violation of the Stored Communications Act.²¹ As for Quon's Fourth Amendment allegations, it held that while the officers had a reasonable expectation of privacy in their text messages, the City's intrusion was reasonable in its inception and scope.²² Finally, the court concluded that had there been a Fourth Amendment violation, the Chief of Police would not have been entitled to qualified immunity.²³

search did not have such a validating purpose, I agree with the plurality that the decision must be reversed and remanded”).

¹⁹ *Narducci v. Moore*, 572 F.3d 313, 319 (7th Cir. 2009)(parallel citations omitted); *see also*, *Biby v. Board of Regents*, 419 F.3d 845, 851 (8th Cir. 2005); *Wiley v. Department of Justice*, 328 F.3d 1346, 1350-351 (Fed. Cir. 2003); *United States v. Gonzalez*, 300 F.3d 1048, 1053 (9th Cir. 2002); *Leventhal v. Knapek*, 266 F.3d 64, 75 (2d Cir. 2001); *United States v. Simons*, 206 F.3d 392, 401 (4th Cir. 2000).

²⁰ *Board of Education v. Earls*, 536 U.S. 822, 837 (2002)(“this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means. . .”); *Vernonia School District 47J v. Acton*, 515 U.S. 822, 837 (2002); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 629 n.9 (1989).

²¹ *Quon v. Arch Wireless Operating Co., Inc.*, 445 F.Supp.2d 1116, 1128-138 (C.D. Cal. 2006).

²² *Id.* at 1138-146 (finding a reasonable expectation of privacy and noting that the search would be reasonable from inception and in scope, if the jury found the purpose of the search was to assess the need to increase the pager character limits); *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d. 892, 899 (9th Cir. 2008)(“the jury found that Chief Scharf's purpose was to ‘determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses’”).

²³ *Quon v. Arch Wireless Operating Co., Inc.*, 445 F.Supp.2d at 1146-148.

The court of appeals found little in the district court opinion with which it could agree. The officers did have a reasonable expectation of privacy, but the search had been unreasonable both with respect to Sergeant Quon and to those who participated in his pager conversations.²⁴ The Chief of Police, however, was entitled to qualified immunity.²⁵ Moreover, the Stored Communications Act had been violated.²⁶

The Stored Communications Act (SCA) permits providers of *remote computing service* to disclose the content of stored communications to subscribers, e.g., the City, without the consent of the participants in the communication.²⁷ Those who provide *electronic communications services*, in contrast, enjoy no such prerogative.²⁸ Since Arch Wireless provided electronic communications services under its pager contract, when it “knowingly turned over the text-messaging transcripts to the City, which was a ‘subscriber,’ not an addressee or intended recipient of such communication, it violated the SCA.”²⁹

The court felt the officers might have a reasonable expectation of privacy in their pager messages in the same way they might have a reasonable expectation of privacy in the content of their mail or e-mail.³⁰ The lieutenant in charge of use of the pagers asserted that he would not audit pager use and separate personal from official use, as long as officers paid for exceeding their character limit. Thus, on a number of occasions when Sergeant Quon had exceeded his limit, he paid for the overuse, and his account had gone unaudited. “Under these circumstances,” the court declared, “Quon had a reasonable expectation of privacy in the text messages archived on Arch Wireless’s server.”³¹

That expectation might still have been required to yield in the face of a City purpose reasonable in its inception and scope, but the court decided that was not the case. The *Ortega* plurality opinion had said a search was reasonable in scope when its methods were “reasonably related to the objectives of the search and not excessively intrusive in light of” the purpose for the search.³² The *Quon* purpose – ensuring that officers would not have to pay for work-related expenses – was reasonable. The court concluded that in view of its purpose, the scope of the search – reading all of the text messages to see if any were private – was excessively intrusive, and hence unreasonable when there were less intrusive means at hand.³³

²⁴ *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d. at 910-11.

²⁵ *Id.* at 903-11.

²⁶ *Id.* at 900-903.

²⁷ 18 U.S.C. 270(a)(2), (b)(3).

²⁸ *Id.*

²⁹ *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d. at 903.

³⁰ *Id.* at 903-906.

³¹ *Id.* at 907.

³² *Id.* at 908, quoting *O'Connor v. Ortega*, 480 U.S. at 726.

³³ *Id.* at 908-909 (“The district court determined that there were no less-intrusive means. . . . We disagree. There were a host of simple ways to verify the efficacy of the 25,000 character limit. . . without intruding on Appellants’ Fourth Amendment rights. For example, the Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the Department to review the redacted transcript”).

The *Quon* court's decision was both criticized and defended in conjunction with the Ninth Circuit's decision not to reconsider the decision en banc.³⁴ Judge Ikuta and several of his colleagues argued that the panel decision erred both in its determination that the officers had a justifiable expectation of privacy in their text messages and that the scope of the department's search was unreasonable.³⁵ From their perspective, the officers could have no such expectation of privacy in messages transmitted on City-owned equipment whose use they had been told was for official business only, and whose use could, and likely would, be monitored and reviewed.³⁶ They also called the panel to task for the line it drew between "excessively intrusive searches" (which are unreasonable) and "least intrusive means" of conducting a search (which reasonableness does not require). They point out that the "Supreme Court has repeatedly rejected a 'least intrusive means' analysis for purposes of determining the reasonableness of a search in a 'special needs' context."³⁷

The author of the panel decision responded that the officers had a reasonable expectation of privacy based on the "policy – formal or informal – that [the Department] established and enforced."³⁸ He further asserted that the panel had not endorsed a "least intrusive means" requirement, but had instead "mentioned other ways the OPD could have verified the efficacy of the 25,000-character limit merely to illustrate . . . that the search was 'excessively intrusive' under [*O'Connor*], when measured against the purpose of the search. . . ."³⁹

The debate in the Ninth Circuit appears to have been limited to the application of *O'Connor*. The panel found that the Stored Communications Act outlawed handing over the transcripts of the officer's pager messages to the City. The judges who dissented from the denial of rehearing raised no objection to that finding. Neither side apparently paused to consider whether the protection of the Stored Communications Act enhanced the Sergeant Quon's reasonable expectation of privacy.

Nor did either side comment upon the panel's fleeting and somewhat cryptic resolution of the Fourth Amendment claims of the others who participated in Sergeant Quon's pager conversations. Rather than continue with an *O'Connor* official work-place analysis, the panel used the standards employed to assess the Fourth Amendment implications of searches and seizures in an electronic context:

We see no meaningful difference between the e-mails at issue in *Forrester* and the text messages at issue here. Both are sent from user to user via a service provider that stores the messages on its servers. Similarly, as in *Forrester*, we also see no meaningful distinction between text messages and letters. As with letters and e-mails, it is not reasonable to expect privacy in the information used to 'address' a text message, such as the dialing of a phone number to send a message. However, users do have a reasonable expectation of privacy in the content of their text messages vis-a-vis the service provider. [Because Jeff Quon's reasonable expectation of privacy hinges on the OPD's informal policy regarding his use of the ODP-issued pagers, *see infra* pages 909-10, this conclusion affects only the rights of Trujillo, Florio, and Jerilyn Quon]. . . . Had Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims. Nevertheless, the OPD surreptitiously reviewed messages that all parties reasonably

³⁴ *Quon v. Arch Wireless Operating Co., Inc.*, 554 F.3d 769 (9th Cir. 2009).

³⁵ *Id.* at 775-76 (Ikuta, J. with O'Scannlain, Kleinfeld, Tallman, Callahan, Bea, and N.R. Smith, JJ., dissenting from the denial of rehearing en banc).

³⁶ *Id.* at 776.

³⁷ *Id.* at 778.

³⁸ *Id.* at 771 (Wardlaw, J., concurring in the denial of rehearing en banc).

³⁹ *Id.* at 773.

believed were free from third-party review. As a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the department would not review their messages absent consent from either a sender or recipient of the text messages. *Quon v. Arch Wireless Operating Co., Inc.*, 529 F.3d at 905-906 (footnote 6 of the court's opinion in brackets).

Quon in the Supreme Court

The Supreme Court agreed unanimously that the City search was reasonable and that the contrary Ninth Circuit determination should be overturned.⁴⁰ The Court began its analysis by assuming, without deciding, that “[f]irst, Quon had a reasonable expectation of privacy in the text messages sent on the pager provided to him by the City; second, petitioners’ review of the transcript constituted a search within the meaning of the Fourth Amendment; and third, the principles applicable to a government employer’s search of an employee’s physical office apply with at least the same force when the employer intrudes on the employee’s privacy in the electronic sphere.”⁴¹

Because the City had a legitimate work-related reason to conduct its search, the Court concluded that it was reasonable under either the *O'Connor* standard – that of Justice Scalia (a search that would be considered reasonable in a private-employer context) or that of the *O'Connor* plurality (a work-related purpose for a search not excessive in scope).⁴² The Court felt no obligation to address any separate claims the officers who had communicated with Sergeant Quon might have, because they had rested their claims on the reasonableness of the search of his communications.⁴³

The Court left for another day two thorny issues it might have reached. The first involves the standard used to decide the extent to which public employees and those who communicate with them enjoy Fourth Amendment protection in the public work place – i.e., endorsement of the *O'Connor* plurality test, the Scalia test, or a third test for when government employees have a Fourth Amendment reasonable expectation of work place privacy. The expectation of privacy test of the *O'Connor* plurality, previously used by the lower federal courts, is difficult to apply. Although the Court declined to endorse it, it did not replace it.

The second issue involves when a communication – wire, oral, or electronic – should be understood to have been searched or seized for Fourth Amendment purposes, and how Fourth Amendment principles applicable to tangible property should be applied to such communications.⁴⁴

⁴⁰ 130 S.Ct. 2619, 2633 (2010). Justice Stevens joined the opinion of the Court in full but filed a separate concurrence to emphasize and applaud the Court’s refusal to resolve the quandary that resulted from the division of the Court in the *Ortega*, *id.* at 2633. Justice Scalia concurred in part and in the result, but refused to embrace that portion of the Court’s opinion which might be thought to give credence to the *Ortega* plurality’s analysis, *id.* at 2634.

⁴¹ *Id.* at 2630.

⁴² *Id.* at 2633.

⁴³ *Id.* (“Respondents argue that because ‘the search was unreasonable as to Sergeant Quon, it was also unreasonable as to his correspondents’ . . . They make no corollary argument that the search, if reasonable as to Quon, could nonetheless be unreasonable as to Quon’s correspondents”).

⁴⁴ See e.g., Kerr, *Searches and Seizures in a Digital World*, 119 HARVARD LAW REVIEW 531 (2005).

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